DEVELOPMENT & COMMERCIAL BANK BHD.

v.

LAND ADMINISTRATOR WILAYAH PERSEKUTUAN & ANOR.

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
MOHD. JEMURI SERJAN SCJ
[SC CIVIL APPEAL NO. 01-70-89]
30 MARCH 1991

LAND LAW: *Debt owed to Federation by registered proprietor/chargor - Registrar's caveat - Prior registered charges - Foreclosure proceedings by chargee - Refusal by Registrar to remove caveat to allow sale - Declaration - Substantive rights of parties - Priority - Whether chargees had a right to apply for cancellation of Registrar's caveat - Ancillary sale - Purpose of caveat - Government Proceedings Act 1956, ss. 10(1), (2) - National Land Code 1965, ss. 243, 268, 320(1)(ba), 321(3), 340(1), 417, 418 - Specific Relief Act 1950, s. 41.*

REVENUE LAW: *Income tax owed by registered proprietor /chargor - Registrar's caveat - Validity - Earlier registered charges - Priority - Relevant considerations - Discretion of Registrar - Ultra vires - Government Proceedings Act 1956, ss. 10(1), (2).*

CONTRACT: *Specific relief - Declaration - Substantive rights - Specific Relief Act 1950, s. 41.*

On 8 March 1983, R, had executed a third party charge of the said land to secure the indebtedness of his company, AJK Holding Sdn. Bhd., to the appellant D&C; this charge was registered. On 17 March 1987 the Land Administrator, the 1st respondent, LA, (who is the Registrar for Land Office Titles) under s. 320(1)(ba) of the National Land Code 1965 (NLC), entered a Registrar's caveat on the said land as requested by the 2nd respondent, the department of Inland Revenue (DIR) as there was a sum of money owing by R to the DIR. D&C was never advised of the entry of the Registrar's caveat.

D&C obtained judgment against AJK and commenced foreclosure proceedings on 27 April 1987. As there was an expression of interest by a potential purchaser, R's solicitors applied for the removal of the Registrar's caveat. However, this application was refused by the LA on 29 November 1988. D&C subsequently sought firstly, a declaration under s. 41 of the Specific Relief Act for the defining of the nature of the substantive rights of the parties for the purposes of determining priority between a registered chargee and the Federation and secondly, an ancillary order under s. 417 of the NLC to give effect to the declaratory judgment.

The High Court rejected D&C's application and had refused to consider the issue of priority and the trial Judge was of the opinion that the declaration of priority would be useless as chargees had been totally excluded under s. 321(3) and therefore had no right to apply for the cancellation of the Registrar's caveat.

The various issues for the Court were:

(a) the reconciling of the indefeasible right of a registered chargee under s. 340 of the NLC to foreclose a charged land with the right of the DIR to freeze the land by making it impossible for any dealing in the said land to be effected even if an order for sale could be obtained under s. 256 of the NLC;

(b) whether a chargee who does not know about the entry of a caveat and who therefore did not object, could apply under s. 321(3) of the NLC for its removal;

(c) whether D&C should have been granted the declaration under the Specific Relief Act 1950 (the 1950 Act) and the ancillary order under s. 417 of the NLC.

The respondents submit that the purpose of the caveat is to enable arrangements to be made for the settlement of the debt due to the Federation and that the caveat should remain indefinitely until a satisfactory arrangement can be made with the proprietor R, the chargee or the purchaser. Further, they argued that D&C ought to have appealed under s. 418 of the NLC against the decision of the LA either for entering the caveat or for his refusal to remove the caveat. D&C argue that on the authority of the Supreme Court decision in *Public Bank Bhd. v. P.T.G. Johore Bahru & Anor.* [1990] 1 CLJ (Rep) 241, only either R, as the proprietor of the said land, and the caveator, can apply for such removal and not D&C as they are excluded from doing so under s. 321(3).

Held:

[1] Unless the Registrar had acted without or in excess of jurisdiction, within the doctrine of *ultra vires*, there is nothing unlawful in the entry of the Registrar's caveat merely because there is an existing charge, just as is perfectly legitimate for another charge or caveat to be registered on encumbered land.

[2] (a) There is nothing in the NLC or elsewhere which creates a charge in favour of the Inland Revenue over the land or any rights giving priority over the chargee;

(b) the only form of priority given is the priority over other unsecured creditors conferred by s. 10 (1) of the Government Proceedings Act 1956 (the 1956 Act) and s. 10(2) is conclusive against the importation of any priority over secured creditors.

[3] (a) A close reading of para. (ba) of s. 320(1) does not suggest that Parliament intends that a chargee or the successful bidder at an auction sale is liable to contribute anything towards the tax liability of the land owner;

(b) the interest created by para. (ba) of s. 320(1) is the interest of securing or ensuring that the land will be available to satisfy any secured or unsecured debt of the proprietor to the government, and that is the interest now recognised by the NLC which can be registered as a caveat, but in the absence of express statutory provision, it enjoys no priority and by virtue of s. 10 of the 1956 Act, the caveat cannot affect any right vested in a registered chargee - consequently, the right of the Registrar to maintain a caveat under para. (ba) is subject to the indefeasible interest of the chargee.

[4] (a) Having regard to the scheme of the NLC and the fact that the Torrens system is to provide titles and interests by registration and not just a system of registration of titles, and in particular to the provisions of ss. 243, 268 and 340 read with s. 10(2) of the 1956 Act, the indefeasible interest of the appellant chargee takes priority over the subsequent Registrar's caveat;

(b) the indefeasibility of interest of the prior registered chargee under s. 340 of the NLC must undoubtedly have priority over whatever interest whether in land or otherwise that may be created or intended to be created in favour of the DIR under s. 320(1)(ba) of the NLC.

[5] Chargees are completely excluded from making an application to cancel the caveat under s. 321(3); therefore there cannot be any decision against which they can possibly appeal. Consequently, the appellant chargee has no alternative remedy and is entitled to apply for a declaration and a consequential order to set aside the caveat under s. 417 of the NLC.

[6] In this case, in the absence of any dispute that there would not eventually be any surplus of any proceeds of sale of the land to be handed over to the DIR after the chargee's priority to payment has been satisfied under s. 268 of the NLC, this is a proper case where the learned trial Judge ought to have exercised his discretion to grant the declaration sought by D&C.

[7] The cases of *Development and Commercial Bank Bhd v. Govt of Malaysia its Public Bank Bhd.* are not applicable in this case as in those cases, the Registrar had communicated to the chargees his decision to enter the caveat.

[8] In the absence of the right to apply for cancellation and as well as the absence of express appeal provision by a chargee relating to refusal of the Registrar to refuse the caveat entered under s. 320(1)(ba), a declaratory relief should be available to the appellant chargee - although the power to grant declaratory judgment must be exercised with great care and jealousy, its usefulness must not be underrated in appropriate cases.

[Appeal allowed; First respondent ordered to cancel Registrar's caveat within one week.]

Cases referred to:

Datuk Syed Kechik v. Government of Malaysia [1979] 2 MLJ 101
Development and Commercial Bank Bhd. v. Government of Malaysia & Ors. [1989] 1 CLJ (Rep) 486
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
Esah bte Saad v. Mariam bte Saad [1975] 2 MLJ 97
Ibeneweka v. Egbuna [1964] 1 WLR 219
Kulu Wan Teh v. Government of Malaysia [1978] 1 MLJ 92
Land Executive Committee of F.T. v. Syarikat Harper Gilfillan Bhd. [1981] 1 MLJ 234
Manggai v. Government of Sarawak [1970] 2 MLJ 41
Malayan United Finance Berhad v. Tan Lay Soon [1991] 1 CLJ (Rep) 292
MBF Finance Berhad v. Pendaftar Hakmilik Negeri Perak [1990] 2 CLJ (Rep) 468
Metal Industry Employees Union v. Registrar of Trade Unions, [1976] 1 MLJ 220
Oversea-Chinese Banking Corp. Ltd. v. Pendaftar Hakmilik Negeri Kedah [1990] 2 CLJ (Rep) 594
Public Bank Bhd. v. P.T.G. Johore Bahru & Anor. [1990] 1 CLJ (Rep) 241
Registrar of Titles Johore v. Temenggong Securities Ltd. & Anor. [1976] 2 MLJ 44

Legislation referred to:

Government Proceedings Act 1956, ss.10(1), (2)
National Land Code 1965, ss. 230(1)(ba), 243, 256, 268, 320(1), 320(1)(ba), 321(3), 340(1), 417, 418
Rules of the High Court 1980, O. 15 r. 16
Specific Relief Act 1950, s. 41

For the appellant - W.S.W. Davidson, (Thomas Mariasoosay, Lucy N.W. Chang with him); m/s. Azman Davidson & Co.
For the respondents - Zaleha Zahari, (Mohd. Bazain Idris with her), Jabatan Peguam Negara
For the intervener - N. Navaratnam; M/s. Shearn Delamore

JUDGMENT

Mohd. Azmi SCJ:

This appeal poses a serious problem confronting the banking industry in this country, regarding the apparent difficulty in reconciling on the one hand, the indefeasibility of interest of registered chargees under s. 340 of the National Land Code, in particular their right to foreclose the charged land, with the right on the other hand, of freezing the land by the Inland Revenue by refusing to remove a Registrar's caveat subsequently entered under s. 320(1)(ba) thereby making it quite impossible for any dealing in the land to be effected even if an order of sale under s. 256 could be successfully obtained. Further, no person in his right mind would agree to purchase any charged land which is also encumbered with a caveat, especially entered for the purpose of securing the availability of the land to satisfy the income tax liability of the proprietor. The fundamental issue for determination is not merely whether the Registrar's caveat under s. 320(1)(ba) can be entered and maintained as of right over land already encumbered with a registered charge, but also more importantly on the issue whether the appellant chargee should have been granted under s. 41 Specific Relief Act 1950 and O. 15 r. 16 RHC 1980 a declaration defining the nature of the respective substantive rights of the parties for the purpose of determining priority coupled with an ancillary order under s. 417 NLC to give effect to the declaratory judgment.

We need to say at the outset, that for purpose of convenience, we heard this appeal jointly with another appeal between *Pendaftar Hakmilik Negeri Kedah and Oversea-Chinese Banking Corp. Ltd.* [1991] 1 CLJ (Rep) 351. Due to some dissimilarity on the facts and different procedure adopted by the chargees, we have decided to deliver separate judgment for each appeal, although the principal issue of law in both appeals relates to s. 320(1)(ba) of the Code.

The facts of this particular case may be summarised as follows. On 8 March 1983, one Dr. Mohd. Rais (the taxpayer/chargor) executed a third party charge to secure the indebtedness of his company, AJK Holding Sdn. Bhd. to the appellant bank, over a piece of land held under G. No.35, Lot 9064, Mukim of Ampang. The land is held under land office title and the land was then free of encumbrances or caveats. On 17 March 1987, that is some four years after the charge was registered, the Land Administrator (1st respondent) who is the "Registrar" in the case of land office title, entered a Registrar's caveat on the charged land pursuant to s. 320(1)(ba) of the Code at the request of the Inland Revenue (2nd respondent). The Land Administrator notified the Inland Revenue and Dr. Mohd. Rais of the entry of the Registrar's caveat but not the appellant chargee. The grounds for the caveat is to protect the interest of the Federation in that Dr. Mohd. Rais has not settled his income tax due to Inland Revenue. On 27 April 1987, that is shortly after the Registrar's caveat was entered, but before the appellant chargee became aware of it, the appellant chargee having obtained judgment against the principal borrower AJK Holdings for RM11.2 million, initiated foreclosure proceedings against the charged land for the purpose of realising the security towards the repayment of debt due. The forced value of the land was estimated by a professional valuer at RM1.8 million. There is no likelihood for a surplus assuming that the appellant chargee is entitled to have priority of payment. On 11 April 1988, before any order for sale was made, a foreign embassy in Kuala Lumpur showed an interest in purchasing the land by a private treaty at RM1.8 million. On 10 October 1988, solicitors for Dr. Mohd. Rais applied to the Inland Revenue for the removal of the Registrar's caveat. The request was refused. Although the entry of the caveat was never communicated to the appellant, Counsel for the appellant did attempt to introduce before us a definite date of knowledge by way of fresh evidence

that the first time the appellant chargee came to know of the caveat was on 29 November 1988, when a copy of the Inland Revenue's letter of refusal to remove the caveat was forwarded to the appellant. The attempt fails as Counsel for the respondents is quick to point out in the supplementary written submission that such fresh evidence is inadmissible. We are therefore left with a situation where on the evidence in the Court below, there is no dispute that until today the decision to enter the March 1987 caveat was never communicated to the appellant by the Land Administrator.

As indicated earlier, the appeal by the appellant is against the refusal of the High Court Judge to allow the declaration sought by the bank. Grounds 3 and 4 of the memorandum of appeal state:

> (3) The learned Judge ought to have exercised his discretion to consider the substantive question of priorities as between the chargee and the Federation arising from the registered charge and the Registrar's Caveat respectively and to have made a declaration that the chargee had priority;
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> (4) having made a declaration on the question of priorities, the learned Judge ought then to have made an order under s. 417 of the National Land Code to give positive effect to the said declaration and to enable the chargee to exercise its prior rights free from the Registrar's Caveat.

In the Court below Counsel for the defendants (the present respondents) conceded that s. 417 empowered the Court to remove the caveat, but on the facts and the circumstances of this case, it was not available to the present chargee. It was also submitted that the Court must decide on the validity of the caveat first before dealing with the question of priority (see p. 18 of appeal record). Be that as it may, the refusal of the trial Judge to grant the declaration sought is not based on any impediment on either issue of validity of the caveat or right of the Inland Revenue to priority, nor on the alleged non-applicability of s. 417. Although we do not have the benefit of a written judgment, the approach taken by the learned Judge was not because the appellant was not entitled to a declaratory judgment, but purely on the pessimistic belief that to do so would be an exercise in futility. This can be garnered from his brief finding at p. 23 of the appeal record:

O.S. dismissed with costs.

> It is quite plain to this Court that the Registrar's caveat can only be removed under s. 321(3). And granting a declaration will not help to remove the caveat. Such a declaration would be ineffective. The declaration sought is refused.

From the above finding, it is apparent that the trial Judge refused to consider the issue of priority and was of the opinion that the declaration on priority would be useless because chargees had been totally excluded from s. 321(3) and therefore had no right to apply for the cancellation of the Registrar's caveat, notwithstanding the concession made by Encik Balia Yusof, Counsel for the 1st and 2nd defendants in the Court below to the effect that in appropriate cases, the Court could order the removal of the caveat under s. 417. If the declaration had been granted, there appeared to be no reason given why it could not be made effective by invoking that section, notwithstanding s. 321(3).

As in the *OCBC's* case (the other related appeal), there is no suggestion here that the Registrar had acted *mala fide* when entering the Registrar's caveat under s. 320(1)(ba) for the purpose of protecting the interest of the Federation in respect of the income tax due from Dr. Mohd. Rais. But unlike the other appeal, the stand taken by Mr. Davidson, Counsel for the appellant is that there is nothing wrong in the Registrar's entering the caveat in the

first instance. He submits that the Land Administrator's action in this particular case is not *ultra vires* for acting in excess of jurisdiction merely because he knew or ought to know the existence of the prior charge in favour of the appellant at the relevant time. However, he proceeds to argue that notwithstanding the valid entry of the Registrar's caveat, the trial Judge ought to grant the appellant the declaration on the legal rights of the parties together with an ancillary order directing cancellation of the caveat under s. 417.

On the issue of the proper procedure to be adopted by an aggrieved chargee under the NLC to remove a Registrar's caveat, we have been told that there have been conflicting decisions in the High Court. One leading opinion is expressed by K.C. Vohrah J in *Development and Commercial Bank v. Government of Malaysia & Ors.* [1989] 1 CLJ (Rep) 486, where the Court held that the chargee cannot proceed under s. 417 but must proceed by way of appeal under s. 418 His Lordship states:

> With respect to learned Counsel I do not agree with her view that her application could have proceeded under s. 417. Section 321(3) prescribes specific instances under which the Registrar's caveat may be cancelled and the plaintiff company had a remedy open to it as is prescribed by s. 321(3)(c). Under para. (a) of s. 321(3) the Registrar may cancel the caveat on his own motion. Under para. (b) the Registrar may cancel the caveat on an application by the proprietor of the land. If the Registrar refuses to cancel the caveat on such an application by the proprietor of the land the proprietor may under para. (c) of s. 321(3) make an appeal under s. 418 of the Code against the Registrar's refusal to cancel the caveat.
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> If there is a person other than the proprietor who is aggrieved by the Registrar's decision to enter the caveat, that person may, as is provided for under para. (c) of s. 321(3), appeal under s. 418 of the Code.

On the particular procedure adopted in that case, we see nothing wrong in the judgment of K.C. Vohrah J. In fact, the decision has been upheld summarily by the Supreme Court *vide* Supreme Court Civil Appeal No. 01-30-1989. But the nagging question here is whether a chargee who knows nothing about the entry of the caveat or who does not object to its entry in the first instance, has the right to apply subsequently under s. 321(3) for the removal of the caveat? He can of course appeal within three months of being notified against the entry of the Registrar's caveat, but if he has no right to apply for its removal, how can he ever appeal against the refusal of any application for its cancellation under s. 418? In any event, K.C. Vohrah J was not dealing with an application for a declaratory judgment when he held that s. 417 was inapplicable in the circumstances of that case.

The other leading opinion can be found in *MBF Finance Berhad v. Pendaftar Hakmilik Negeri Perak* [1990] 2 CLJ (Rep) 468 where Peh Swee Chin J ordered the removal of the Registrar's caveat on the chargee's application by originating motion which also contained a claim for a declaration of the chargee's right ranking in priority to that of the Inland Revenue. His Lordship was of the view that even if there was an existing charge, the Registrar or Land Administrator was entitled to enter a caveat under s. 320(1)(ba). At p. 440, His Lordship states:

> Thus the new para. (ba) undoubtedly creates an express statutory right for any government department such as the Inland Revenue department, in respect of any debt due to it from a land owner to request a Registrar of Titles to enter a Registrar's caveat, and the Registrar, in exercising his quasi-judicial discretion described by Lord Diplock in *Temenggong,* can no longer in my view, rely on the decision of the *Temenggong,* in refusing to enter a Registrar's caveat on the ground that the debt would not come within the word 'interest' in s. 320(1) of the Code. In view of the wording of the new para. (ba), the Registrar has no longer any discretion in refusing to enter such a caveat. It brings to mind some legislation in some sort of analogical

mould, example, Essential (Protection of Depositions) Regulations 1986 which enable the Bank Negara or Central Bank to petition to Court for the winding-up of a deposit-taking company though not being one of a recognized group of petitioners such as a contributory, creditor etc. The Bank Negara, though qualified to petition for such winding-up obtains no interest of any kind for itself in the assets of the company.

Further down His Lordship continues:

Applying the test laid down by Privy Council in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212, the onus would be for the caveator, and in the instant case, the party in the shoes of a caveator, who had requested the Registrar to enter a Registrar's caveat for his benefit, that is the director general to satisfy this Court that on the evidence presented to it, it did raise a serious question to be tried as to his claim to an interest in land as recognized by the Code. Thus the first hurdle against the director general desirous of having the caveat remaining on the register proved to be insurmountable for no interest of the kind has been created by the new para. (ba).

Unless the Registrar has acted without or in excess of jurisdiction, within the *ultra vires* doctrine, we agree with the judgment of Peh Swee Chin J that there is nothing unlawful in the entry of the Registrar's caveat merely because there is an existing charge, just as it is perfectly legitimate for another charge or caveat to be registered on encumbered land. The remedy lies usually in the removal of the disputed caveat save where the decision on the entry is a nullity.

On the issue of priority, the effectiveness of a charge under the Torrens System is provided by s. 243 of the NLC:

Every charge created under this Act shall take effect upon the registration so as to render the land for lease in question liable as security in accordance to the provisions thereof, expressed or implied.

On the indefeasibility of interest of the registered chargee, s. 340(1) provides:

The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

There is no dispute in this appeal that the interest of the appellant chargee does not come under any of the provisos of s. 340 and as such, its interest is indefeasible under the Code.

However s. 320(1)(ba) of the NLC which was introduced by amending Act No. A444 with effect from 16 February 1979 to circumvent the decision of the Privy Council in *Registrar of Titles Johore v. Temenggong Securities Ltd. & Anor.* [1976] 2 MLJ 44, which limited the nature of interests of the Government which the Registrar was entitled to protect under s. 320(1) to secured creditors, is now enlarged to include unsecured creditors.

The new para. (ba) reads:

Subject to subs. (2), a Registrar's caveat may be entered in respect of any land wherever such appears to the Registrar to be necessary or desirable:

(ba) for securing that the land will be available to satisfy the whole or part of any debt due to the Federation or the State Authority, whether such debt is secured or unsecured and whether or not judgment thereon has been obtained.

Counsel for the appellant adopts the reasoning of Peh Swee Chin J in *MBF Finance Bhd.* case that there is nothing in the NLC or elsewhere which creates a charge in favour of the Inland Revenue over the land or any rights giving priority over the chargee. He also submits

that K.C. Vohrah J in the *Oversea-Chinese Banking Corp. Ltd. v. Pendaftar Hakmilik Negeri Kedah* [1990] 2 CLJ (Rep) 594 at p. 599 (the other related appeal) is also correct in holding that the only form of priority given is the priority over other unsecured creditors conferred by s. 10(1) of the Government Proceedings Act 1956. Further, he submits that s. 10(2) is conclusive against the importation of any priority over secured creditors, when it says:

> Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortgage or charge.

We agree with the submission of Counsel for the appellant. In fact reading the supplementary written submission of Counsel for the respondents, it is not seriously challenged that s. 320(1)(ba) does not create any security similar to that created by a charge under s. 243. In para. 21, Counsel even goes further by conceding that the Government does not acquire any interest in the land at all. In our view, a close reading of para. (ba) also does not suggest that Parliament intends that a chargee or the successful bidder at an auction sale is liable to contribute anything towards the tax liability of the land owner. Its only purpose is to prevent dealings in the land in appropriate cases for securing that the land will be available to satisfy the indebtedness of the proprietor to the Government. The word "securing" in para. (ba) must simply mean "ensuring". In our view the interest created by para. (ba) is the interest of securing or ensuring that the land will be available to satisfy any secured or unsecured debt of the proprietor to the government, and that is the interest now recognised by the NLC which can be registered as a caveat, but in the absence of express statutory provision, it enjoys no priority, and by virtue of s. 10 Government Proceedings Act 1956, the caveat cannot affect any right vested in a registered chargee. Thus, the right of the Registrar to maintain a caveat under para. (ba) is subject to the indefeasible interest of the chargee. In the circumstances, we do not agree with the submission of Counsel for the respondents that the purpose of the caveat is to enable arrangement to be made for settlement of debt due to government and that the caveat should remain indefinitely until a satisfactory arrangement can be made with the proprietor, the chargee or the purchaser. In our opinion, we cannot read into para. (ba) that the Registrar has unlimited power to suspend the vested right of the registered chargee in that fashion.

We are therefore of the opinion that having regard to the scheme of the NLC and the fact that the Torrens System is to provide titles and interests by registration and not just a system of registration of titles, and in particular to the provisions of ss. 243, 268 and 340 read with s. 10(2) Government Proceedings Act 1956, the indefeasible interest of the appellant chargee takes priority over the subsequent Registrar's caveat, in the same way that this Court has held in *Malayan United Finance Berhad v. Tan Lay Soon* in [1991] 1 CLJ (Rep) 292 that a registered charge takes priority over private caveats. The indefeasibility of interest of the prior registered chargee under s. 340 must undoubtedly have priority over whatever interest whether in land or otherwise that may be created or intended to be created in favour of the Inland Revenue under s. 320(1)(ba).

The only remaining point raised by the respondents against the granting of the declaration which merits our consideration is the submission that the appellant chargee ought to have appealed under s. 418 against the decision of the Land Administrator either for entering the caveat, or for refusing to remove the caveat. To this argument Counsel for the appellant points out that firstly the appellant chargee does not challenge the right of the Land Administrator to enter the caveat. As to the alternative suggestion that they should have applied for the removal of the caveat, Counsel says that on the authority of the Supreme

Court in *Public Bank Bhd. v. P.T.G. Johore Bahru & Anor.* [1990] 1 CLJ (Rep) 241 only Dr. Mohd. Rais, the proprietor of the land and the caveator can do so, but the appellant chargee has been excluded from the provision of s. 321(3).

This sub-section provides:

> Section 321(3) A Registrar's caveat shall continue in force until it is cancelled by the Registrar:
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> (a) of his own motion; or
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> (b) on an application in that behalf by the proprietor of the land affected; or
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> (c) pursuant to any order of the Court made on an appeal under s. 418 against his decision to enter the caveat, or his refusal of any application for its cancellation under para. (b).

Although *Public Bank* case did not specifically deal with a declaratory relief, reading the judgment of the court at p. 349, there is some indication that chargees are completely excluded from making an application to cancel the caveat under s. 321(3). This is in fact the opinion of the trial Judge in this case and we agree with the learned Judge as far as the exclusion is concerned. As alluded to earlier, if the chargee has no right to apply for the cancellation of the caveat, how could it ever appeal under s. 418? Since the chargee cannot even apply, there cannot be any decision against which it can possibly appeal. Consequently the appellant chargee has no alternative remedy and is entitled to apply for a declaration and a consequential order to set aside the caveat under s. 417 which is exactly what the appellant is doing instantly.

The learned Counsel for the respondent has referred to us a number of authorities where the Courts in this country have consistently refused to order a declaratory order where the aggrieved party has elected not to appeal although the remedy of appeal is available. (See *Esah bte Saad v. Mariam bte Saad* [1975] 2 MLJ 97, and *Kulu Wan Teh v. Government of Malaysia* [1978] 1 MLJ 92). In *Metal Industry Employees Union v. Registrar of Trade Unions,* [1976] 1 MLJ 220, the Federal Court upheld the decision of Wan Suleiman FJ, in declining the declaratory order since an alternative remedy existed by way of appeal under the Trade Unions Ordinance 1959. In addition, we also wish to refer to similar decisions of the Federal Court in *Manggai v. Government of Sarawak* [1970] 2 MLJ 41 and *Land Executive Committee of F.T. v. Syarikat Harper Gilfillan Bhd.* [1981] 1 MLJ 234. But for reasons already discussed, we are satisfied that the appellant does not have an alternative remedy in this case.

Having regard to the circumstances of this appeal, we are of the view that this is a proper case where the learned trial Judge ought to have exercised his discretion to grant a declaration as to the substantive right of the appellant chargee to priority over the Inland Revenue, particularly in the absence of any dispute that there would not eventually be any surplus of any proceed of sale of the land to be handed over to the Inland Revenue after the chargee's priority to payment has been satisfied under s. 268 of the Code. In our view, the learned Judge was in error when he assumed that it would be futile to grant the declaration sought.

The judgment of this Court in *Development and Commercial Bank Berhad v. Government of Malaysia* [1989] 1 CLJ (Rep) 486 and *Public Bank Berhad v. Pengarah Tanah & Galian Johore Baharu & Anor.* [1990] 1 CLJ (Rep) 241 are not applicable in the instant appeal, because there, the Registrar had communicated to the chargees his decision to enter the caveat. The remedy of appeal was undoubtedly available to them, and there was no difficulty in determining whether the appeal by the chargees was lodged within or without the statutory period under s. 418.

For the above reasons, we are of the opinion firstly that there is no express provision in s. 321 of the National Land Code to enable a chargee on its own right to apply to the Registrar or Land Administrator to cancel or remove the Registrar's caveat, thereby making it quite impossible for the chargee to obtain a decision of the Registrar for the purpose of an appeal under s. 418. Secondly, under s. 321(3), read with s. 418 a chargee can only appeal against the Registrar's decision to enter the caveat but not against a decision refusing to cancel the caveat. In the absence of the right to apply for cancellation and as well as the absence of express appeal provision by a chargee relating to refusal of the Registrar to remove the caveat entered under s. 320(1)(ba), a declaratory relief should be available to the appellant chargee. It is of course true that the power to grant declaratory judgment must be exercised with great care and jealousy, but at the same time its usefulness must not be underrated in appropriate cases. Thus in *Ibeneweka v. Egbuna* [1964] 1 WLR 219 at p. 224, Lord Radcliffe in giving the decision of the Privy Council said:

> Under O. 25, r.5, the power of the Court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide.

This passage was quoted with approval by Lee Hun Hoe CJ in the Federal Court in *Datuk Syed Kechik v. Government of Malaysia* [1979] 2 MLJ 101 at 107, and in the same case the learned Chief Justice also said at p. 107:

> The basis of the jurisdiction is O. 25 r. 5 of the Rules of the Supreme Court. The prevailing view seems to be that the Court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

and

> A declaratory order will eliminate anxiety of having to live under a cloud of fear. In granting a declaration the Court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that my result on the other hand. As to the determination of future right, its importance for certain purposes is not in doubt, particularly when a mere declaration is usually the only remedy.

In the same case, the learned Chief Justice also said at p. 108:

> In *Ruislip-Northwood U.D.C. v. Lee* plaintiff sought the ruling the Court on a definite, concrete and existing dispute. The fact that the declaration was sought before the statutory powers were exercised was not a consideration weighing against the grant of that declaration. Nowadays, the Courts seldom refuse to make orders on grounds that it is premature to consider the question. As Greer LJ pointed out that it had been for years the practice to know and determine claims for declaration of rights where there was a real and not a fictitious or academic question involved in order that the parties might know what course to take without running the risk of finding themselves liable to damages. Indeed, we consider that a Court should make it possible to settle real disputes immediately they arose, so that the parties may act with certainty and not be under the threat of legal uncertainty and should be able to discount the future.

Applying the above principles, we would allow this appeal with costs by granting the declaration sought, and under s. 417 we order the Land Administrator (the first respondent) to cancel the caveat within one week from today. We also order that the deposit be refunded to the appellant.

Also found at [1991] 2 CLJ 1092